NO. 22656

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHENANDOAH RACHEL MORALES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney

PHILLIP W. JOHNSON,
Assistant U. S. Attorney

325 West "F" Street,
San Diego, California 92101

Attorneys for Appellee,
United States of America.

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Attorneys for Appellee,
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I.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in all counts of a four-count indictment, at the conclusion of trial without a jury [C.T. 2-5, 12, 17].[1/]

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291

1/ "C.T." refers to the Clerk's Transcript of Record.

and 1294.

II.

STATEMENT OF THE CASE

Appellant was charged in all counts of a four-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellant knowingly imported and brought approximately 4-1/2 ounces of heroin, a narcotic drug, into the United States from Mexico, contrary to Title 21, United States Code, Section 173 [C.T. 2].

Count Two charged that appellant knowingly concealed, and facilitated the transportation and concealment of, approximately 4-1/2 ounces of heroin, a narcotic drug, knowing that it had been brought into the United States contrary to law [C.T. 3].

Count Three charged the smuggling of approximately one-fourth of an ounce of cocaine, a narcotic drug. Count Four charged the concealment, etc., of the same quantity of cocaine [C.T. 4-5].

Appellant waived the right to trial by jury. Court trial of appellant commenced on October 20, 1966, before United States District Judge Fred Kunzel. On the same date, appellant's motion to suppress evidence was denied, and she was found guilty as charged upon all counts [C. T. 11, 17].

Thereafter, on December 9, 1966, appellant was committed to the custody of the Attorney General for five years upon each count, to run concurrently [C.T. 23].

Appellant filed a timely notice of appeal from the judgment upon Counts

One and Two [C.T. 24].

III.

ERROR SPECIFIED

Appellant specifies two points upon appeal, both of which involve the same issue, which is the reasonableness of the visual inspection of appellant by a female Customs employee at the international border.

IV.

STATEMENT OF THE FACTS

On May 24, 1966, Customs Agent Walter Gates placed a "look-out" for a vehicle in which appellant was an occupant when it subsequently entered the United States from Mexico on the same date [R.T. 3-4, 65-66].[2/]

A "look-out" is placed by the Customs Service with inspectors on the primary inspection areas at the border [R.T. 6-7].

Before placing the "look-out," Agent Gates received information from an informant. This informant had provided reliable information in the past [R.T. 66].

The informant told Agent Gates that he had seen the vehicle in question, parked in the driveway of the Tijuana, Mexico, residence of Flattop. Flattop was a lieutenant of Tony Sanchez, a narcotic dealer [R.T. 67].

When the vehicle entered the United States from Tijuana, Mexico, on May 24, at San Ysidro, California, it was occupied by appellant and two boys [R.T. 3-4, 15]. An immigration inspector noticed that the vehicle was on

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2/ "R.T." refers to the Reporter's Transcript of Proceedings.

"look-out" and directed the vehicle to the secondary inspection area. A female Customs employee, June Genesta, conducted a search of appellant in a small room which had no windows [R.T. 2, 6, 13-14, 16].

During the search, appellant was requested to remove her clothing, spread her legs, bend over, and to spread her buttocks [R.T. 17, 19-20]. Agent Gates testified that female narcotic violators or smugglers will carry narcotics in a body cavity or in the stomach, although brassieres and purses are sometimes used [R.T. 72].

Appellant complied with the instructions, and Miss Genesta observed a small white rubber balloon as it protruded from appellant's vagina [R.T. 20].

Miss Genesta asked appellant to remove the object, but appellant refused, stating that nothing was there. Miss Genesta repeated the request several times and informed appellant that she had seen it and knew that it was there, but appellant insisted that nothing was there [R.T. 15].

Miss Genesta then stated, "Well, you will be taken to a doctor in any event who will remove it." Appellant replied, "Let them take me to a doctor. There's nothing there." [R.T. 15].

Miss Genesta did not touch appellant during the visual search [R.T. 17].

Appellant was taken to the office of Dr. Paul R. Salerno, located about 15 miles from the international border [R.T. 33-35, 58]. Dr. Salerno was a physician licensed to practice medicine in the State of California [R.T. 34].

Dr. Salerno removed four rubber-enclosed packets from appellant's vaginal cavity. This was accomplished in a medically-approved manner

under sanitary conditions. There was no violence [R.T. 35-36, 56-57].

The packets weighed approximately five ounces and contained heroin and cocaine [R.T. 36, 63]. There was no search warrant or warrant of arrest up to that time [R.T. 72].

V.

ARGUMENT

A. THE VISUAL INSPECTION OF APPELLANT BY A FEMALE CUSTOMS EMPLOYEE CONSTITUTED A REASONABLE BORDER SEARCH.

Appellant does not question the validity of the second search and removal of the narcotics from her vagina by Dr. Salerno. There would be no basis for an attack upon this second search, since it had previously been determined that an object was hidden in appellant's vagina. This Court has stated:

> "There is nothing in the Bill of Rights which makes body cavities a legally protected sanctuary for carrying narcotics."
>
> Blackford v. United States, 247 F.2d 745, 753 (9th Cir. 1957).

In Henderson v. United States, 9th Cir., No. 21,190, July 7, 1967, the Court implied that vaginal cavities are not immune from search under appropriate circumstances.

In People v. John Martin Gunaca and Josephine Paz Macias, Crim. No. 9780, April 26, 1965, the District Court of Appeals of the State of California, Second Appellate District, in an unpublished opinion, upheld the action of

officers in taking a female defendant to a jail, where she was inspected in the nude by female deputies, and then to a hospital, where a doctor and two nurses removed heroin from her vagina. The United States Supreme Court denied certiorari in that case on January 17, 1966.

Macias v. California, 382 U. S. 993 (1966).

However, appellant objects to the mere visual inspection, not to the final search and removal of the narcotics.

The visual inspection of appellant by Miss Genesta involved no physical contact with appellant's body [R.T. 17]. It was an examination of a female suspect by another female who was employed by United States Customs. The search followed appellant's entry into the United States, so it was a Customs border search.

A border search requires no probable cause.

Rivas. v. United States, 368 F.2d 703, 709 (9th Cir. 1966);

Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966);

King v. United States, 348 F.2d 814, 817 (9th Cir. 1965), cert. denied, 382 U.S. 926 (1965).

However, in Rivas, supra, this Court applied a speical test to body cavity border searches, requiring a "plain suggestion" that contraband has been smuggled (Rivas, supra, at p. 710). In Henderson, supra, this "plain suggestion" test was applied, by the majority opinion, to a visual vaginal inspection. The Rivas-Henderson test was based upon Schmerber v. California, 384 U.S. 757 (1966). Rivas and Henderson involved an extension of

Schmerber, as Schmerber was concerned with the extraordinary circumstances of forcibly breaking into a suspect's body and penetrating the skin in order to remove blood. However, the search that was successfully challenged in Henderson involved a visual inspection, not a physical penetration into the body.

In an earlier decision, this Court rejected an appellant's complaint that she had been viewed in an unclothed state by a female Customs employee:

> "Appellant likewise urges that she was required to strip herself of all her clothing at the time she was searched. Such a search is frequently necessary."
>
> Witt v. United States, 287 F.2d 389, 391 (9th Cir. 1961), cert. denied, 366 U. S. 950 (1961).

The visual inspection of appellant was based upon information provided by an informant who had previously proved to be reliable [R.T. 66-67]. The trier of facts held that Agent Gates received information regarding the location of an automobile in the drive-way of a known lieutenant of a narcotic dealer and that:

> "the reasonable inference would be that the persons who owned the car or were driving the car had something to do with narcotics, so he would not be doing his duty if he didn't post a look-out for the automobile and certainly they then had the right, because of this suspicious circumstance, to search the people that were in the automobile and they conducted a proper search of this defendant. It was

a reasonable search under the circumstances." [R.T. 74].

This finding by the experienced trial Judge is entitled to considerable weight. Another factor of great importance in this appeal is the existence of the information provided by the reliable informant. Henderson, supra, believed to be the only published appellate opinion on the subject of vaginal searches, emphasizes the importance of the type of information that is present here and was lacking in Henderson:

> "Appellant [Henderson] crossed the border in an automobile driven by one Banks. The customs officers had not received any information in relation to the car or to Banks or to appellant that would alert them to the possibility that they might be carrying narcotics. Such information did exist in Denton, Blefare and Witt, supra, n. 1."

This Court has stated that between 18% and 20% of the international traffic in narcotics in this area is conducted by smuggling in body cavities. Blackford, supra, at p. 752.

It is respectfully submitted that the ruling of the trial Court properly resolved the question of balancing the interests of protection of the international borders, against the interests of society in deterring unwarranted searches based upon mere whim or caprice.

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U.S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PHILLIP W. JOHNSON
Assistant U. S. Attorney